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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 52

THE NEW YORK TIMES COMPANY,
A Corporation,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 19, 1962.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (Appendix, *infra*, p. 30) are reported in 308 F. 2d 474. The opinion of the District Court (Appendix, *infra*, p. 19) is reported in 195 F. Supp. 919.

Jurisdiction

The judgment of the Court of Appeals was rendered on September 18, 1962. A petition for rehearing and motion for rehearing en banc were denied on November 19, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Question Presented

Libel actions instituted in the Circuit Court of Montgomery County, Alabama, by the Governor of the State and an elected Commissioner of the City of Montgomery, based on the publication of an advertisement allegedly critical of their official action, named as defendants the petitioner, a New York corporation, and four Negro clergymen, resident in Alabama, whose names appeared on the advertisement as endorsers of its appeal for funds for the legal defense of Martin Luther King and student groups demonstrating for racial equality.

The only evidence that plaintiffs can adduce against the resident defendants is that their names were placed on the advertisement without their knowledge or consent by one with whom they had no agency relationship; that they remained silent when the plaintiffs, shortly before filing suit, sent them a demand to publish a retraction; and that an organization of which they were officers subsequently received some of the funds raised by the advertisement for use in the defense of student demonstrators.

The Court of Appeals held that, on these facts, there was a reasonably arguable case against the resident defendants, precluding petitioner's removal of the actions to the United States District Court on the ground of diversity of citizenship.

The question presented is whether this decision is in conflict with applicable Alabama law or attributes to the State the possible adoption of a rule of liability repugnant to the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment provides:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

U. S. C., Title 28 § 1332 provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties . . ."

U. S. C., Title 28 § 1441 provides:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. . . ."

Statement

These are two of five libel actions brought by Alabama officials against petitioner, a New York corporation, and four co-defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, all of whom are citizens of Alabama. The suits were based on the publication in *The New York Times* on March 29, 1960, of an advertisement sponsored by an organization called the "Committee to Defend Martin Luther King and the Struggle for Free-

dom in the South". The advertisement (R. 14) portrayed the activities and protests of students and others engaged in non-violent demonstrations under the leadership of Dr. King against the practices of racial segregation and concluded with an appeal for funds to support the legal defense of Dr. King, who had been charged with perjury, the support of the students and the struggle for the right to vote. The names of the four resident defendants appeared on the advertisement as endorsers of the appeal for funds.

Governor Patterson instituted his action in the Circuit Court of Montgomery County, Alabama, on May 30, 1960, claiming $1,000,000 damages (R. 211-216) and Commissioner Parks, one of the three elected Commissioners of Montgomery, brought suit on April 19, 1960, demanding $500,000 (R. 8-14). The publication alleged to have libeled the plaintiffs is the same advertisement as that involved in *The New York Times Company* v. *L. B. Sullivan* and *Abernathy, Shuttlesworth, Seay, Sr.*, and *Lowery* v. *L. B. Sullivan*, pending on petitions for writs of certiorari to the Supreme Court of Alabama, Nos. 606 and 609, this Term. Except for the differences in the offices held by the respective plaintiffs, the complaints in these two actions are substantially the same as in the *Sullivan* case and in the two other suits based on the advertisement, which were brought by Mayor James of Montgomery and by former City Commissioner Sellers. Governor Patterson's complaint also named Martin Luther King, Jr., as a defendant but Dr. King, a citizen of Georgia, was not served with process in Alabama and did not appear in the cause. He did, however, file a consent to the removal of the action to the District Court.

The *Sullivan* case was tried in the Montgomery Circuit Court in November, 1960, resulting in a verdict and judgment for the plaintiff against all defendants for $500,000.

the full amount claimed. The *James* case was tried thereafter, ending on February 1, 1961 with a verdict for the plaintiff also for $500,000. Petitioner's motion for a new trial in the *Sullivan* case was denied on March 17, 1961; that in the *James* case is still pending before the Montgomery Circuit Court. The Supreme Court of Alabama affirmed the *Sullivan* judgment on August 30, 1962 (144 So. 2d 25).

On April 13, 1961, shortly before the *Parks* case was to come to trial, petitioner removed the *Parks*, *Patterson* and *Sellers* cases to the United States District Court for the Middle District of Alabama. The petitions for removal (R. 3-8; 205-211) set forth the diversity of citizenship between the defendant and the respective plaintiffs in each of the actions and averred that the four Alabama co-defendants had been fraudulently joined as parties, in the sense that there was "no reasonable basis under the law of Alabama" upon which their liability could be established. In support of the averment of fraudulent joinder, the petition stated that at the trials in the *Sullivan* and *James* cases "the uncontroverted evidence of the four resident defendants showed that they had not in any manner authorized or consented to the using of their names as indorsers of the advertisement which gave rise to the alleged libel, and that they exercised no authority or control over the defendant, the *New York Times Company*, nor sustained any legal relationship to it"; that "the theory of liability" advanced by the plaintiffs "was based on an assumed duty to disavow any connection with the allegedly libelous advertisement and the respective juries were erroneously charged by the trial Court that the said resident defendants' consent to the publication . . . could be inferred from their failure to so disavow"; that the "only facts on which the plaintiff purported to establish a liability against the

resident defendants" consisted of the printing of their names as indorsers of the appeal for funds, the plaintiff's written demand for a retraction and the failure of the defendants to reply, retract or disavow; that these facts do not constitute a basis for liability under the law of Alabama. Finally, in support of the timeliness of the removal, the petition stated that it "did not sufficiently appear to the defendant" that the cause was removable because of the fraudulent joinder of the resident defendants until after the trials of the *Sullivan* and *James* cases in the Montgomery Circuit Court.

Patterson and Parks moved to remand (R. 17-21; 219-224), contending that the verdicts and judgments in the *Sullivan* and *James* cases established that the evidence against the resident defendants sufficed to present a jury question as to their liability; and that the petitions for removal were, in any case, untimely under 28 U. S. C. § 1446(b).

The District Court held a hearing on the motion at which the record in the *Sullivan* case was received in evidence in support of the removal (R. 32-35).* It showed that each of the resident defendants denied unequivocally under oath that he had authorized the use of his name on the advertisement or that he knew of its publication prior to receiving the demand for a retraction or that he had seen it prior to the institution of the action or that he was a member of the Committee to Defend Martin Luther King or connected with the Committee in any way (S. Tr. 1914-1931). The record also showed that John Murray, one of the writers who prepared the advertising copy, testified

* This transcript was not printed in the record in the Court of Appeals, the original having been transmitted to the Court under Rule 75 i (R. 263). The transcript is included in the record filed with this petition and is here referred to as "S. Tr."

that the original draft of the proposed advertisement did not contain the statement "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal" or any of the names printed thereunder, including those of the defendants. That statement and those names were added on the suggestion of Bayard Rustin, the Director of the Committee to Defend Martin Luther King, who told Murray that it was unnecessary to obtain the consent of the individuals involved since they were all members of the Southern Christian Leadership Conference, as indicated by its letterhead, and "since the SCLC supports the work of the Committee . . . he [Rustin] . . . felt that there would be no problem at all, and that you didn't even have to consult them" (S. Tr. 1933-1935, 1936).

This was all the evidence in the *Sullivan* action relating to the resident defendants. The Montgomery Circuit Court ruled, nonetheless, that there was a case for submission to the jury (S. Tr. 1944), charging as follows (S. Tr. 1952-1953):

> "Now, it is the contention of the plaintiff here that although you may believe, as to the four individual defendants, that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff, Sullivan, that the four individual defendants after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names, that is, that they approved and sanctioned this advertisement. In other words, the plaintiff, Sullivan, insists that there was a ratification of the advertisement and the use of their names as signers of the advertisement by the four individual defendants and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous

authorization and is a confirmation or approval of what has been done by another on his account. Now, it is for you twelve jurors to say from all the evidence whether the four defendants ratified the advertisement now before you, that is, ratified that advertisement as I have defined the word ratification to you."

At the hearing before the District Court, counsel for Governor Patterson asserted (R. 78) that he expected to take the deposition of Martin Luther King, Jr., whose evidence he expected "to show that this committee had the names of these resident defendants and that they had authority to use it". In view of this statement, and over the objection of counsel for Parks (R. 168), the Court ordered the testimony of Dr. King to be taken by deposition, designating counsel to interrogate the witness for the Court (R. 165-167).

Martin Luther King, Jr., testified* that he was president of the Southern Christian Leadership Conference and had been since it was founded in 1957; that Rev. Abernathy was the treasurer, Rev. Shuttlesworth the secretary, Reverend Lowery third vice-president and Rev. Seay a member of the executive board; that there was "no relationship" between the Southern Christian Leadership Conference and the Committee to Defend Martin Luther King; that the Conference had not taken any formal or informal action to support the Committee, which was formed "by concerned citizens in New York"; that most of the members of the Conference Board were unaware that the Committee was formed; that no authority had ever been given to the Conference to use the names of the Conference or any of its members in connection with the program of the Committee;

* The transcript of Dr. King's testimony was not printed in the record in the Court of Appeals, the original having been transmitted to the Court under Rule 75 i (R. 203). The transcript is included in the record filed with this petition and is here referred to as "K. Tr."

that no such authority had been solicited by the Committee or given to it by him or by anyone else; that the Conference had never endorsed the advertisement or ratified it in any way; that none of the four resident defendants served on the Committee; that he knew of no basis for Rustin's statement to Murray that the defendants' names could be used without consulting them (K. Tr. 5-12, 14); and that he himself had no connection with the Committee (K. Tr. 45-46).

Dr. King also testified that the Southern Christian Leadership Conference had received some funds from the Committee to Defend Martin Luther King for the assistance of the student movement (K. Tr. 47); that the individual defendants did not receive any such funds as individuals, though they may have "as heads of organizations" (K. Tr. 46); that "otherwise the Committee had direct relationship with the lawyers" (K. Tr. 47).

The Court also received in evidence (R. 47) the verified complaint (R. 109-164) in an unsuccessful action in the United States District Court brought by the resident defendants against Governor Patterson, Mayor James, Commissioners Sullivan and Parks and others, seeking *inter alia* to enjoin the prosecution of these libel actions, to set aside the judgments in the *Sullivan* and *James* cases and to enjoin the sale of property under executions levied on those judgments. See *Abernathy* v. *Patterson*, 295 F. 2d 452, *cert. denied*, 368 U. S. 986.

That complaint contained an allegation (R. 118) referring to the advertisement as having been inserted in *The New York Times* by "supporters of the plaintiffs [Abernathy *et al.*] and the movement for equality which they lead, on their own, and pursuant to their own responsibility, utilizing the channel of a free press . . ." It also described the purpose of the advertisement to include soliciting "sup-

port for the defense of the Reverend Martin Luther King, Jr., a leader in the movement in which the plaintiffs [Abernathy *et al.*] participate as active leaders" and soliciting "support for the plaintiffs herein and their supporters in their peaceful activities for the enforcement of their right to vote" (R. 118, 119). These allusions to "supporters" and "support" were adduced as admissions by the resident defendants tending to establish their liability for the publication of the advertisement.

On the foregoing record, the District Court denied respondents' motions to remand (R. 187). Its opinion found the facts to be as follows (R. 182; Appendix, *infra*, p. 25):

> ". . . The evidence shows that the article in question was placed in The New York Times by an individual named John Murray, who was acting for a committee to defend Martin Luther King, Jr. Murray inserted the names of the four resident defendants as sponsors of the article. They were neither officers nor members of the committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted."

On these facts, the Court concluded that under the principles declared by the Supreme Court of Alabama in *Burns* v. *Campbell*, 71 Ala. 271, 289, 290 and reaffirmed in *W. E. Belcher Lumber Co.* v. *York*, 245 Ala. 286, "there is no legal basis whatsoever for the claim asserted against the resident defendants": that "no liability on the part of the resident defendants existed under any recognized theory

of law"; and that their "joinder in each of these cases was therefore 'fraudulent' as that term is applied in removal cases" (R. 180; Appendix, *infra*, p. 23).

The Court also held that the twenty-day period prescribed by 28 U. S. C. § 1446 does not apply in "instances of fraudulent joinder" where the Courts "should accept petitions filed within a reasonable time after the right to removal becomes apparent (that is; after the fraudulent joinder becomes evident)" (R. 184; Appendix, *infra*, p. 27). It "specifically" found "that in each of these cases the removal to this Court on April 13, 1961, was within a reasonable time after it could have and should have become apparent to the defendant The New York Times Company that there was no reasonable basis under the law of Alabama upon which the liability of the individual defendants could be established for and on account of the alleged libelous publication made the basis for plaintiffs' actions" (R. 185; Appendix, *infra*, p. 28).

On interlocutory appeal, authorized under 28 U. S. C. § 1292(b) (R. 193-195), the Court of Appeals reversed by a divided vote. Without passing on the timeliness of the removal (Appendix, *infra*, p. 40), Judge Bell, with the concurrence of Judge Brown, held that there was "a reasonable basis in law and fact" for the contention that the resident defendants had ratified or adopted the advertisement, in view of their failure to respond to the letters demanding a retraction or to disavow the use of their names, the allegation in the complaint in *Abernathy* v. *Patterson* "that the advertisement was for their benefit and support" and the testimony of Dr. King that the Southern Christian Leadership Conference, in which the resident defendants were officers, "received some of the funds raised through the medium of the ad." The question was

said to be "a close one" which "could go either way" (Appendix, *infra*, pp. 38, 40). Judge Ainsworth dissented on the ground that the "circumstances here did not oblige" the resident defendants "to issue a denial about the publication when demand for a retraction was made by plaintiffs upon them"; that there "is no evidence whatsoever on the part of the resident defendants of ratification by silence or otherwise"; and that the findings of fact by the District Court should, in any event, have been accepted under Rule 52 (a), Federal Rules of Civil Procedure (Appendix, *infra*, pp. 44, 45).

REASONS FOR GRANTING THE WRIT

I

In holding that there is a reasonably arguable case against the resident defendants, based on their alleged ratification or adoption of the publication claimed to constitute a libel, the Court of Appeals has decided an important question of Alabama law, the determination of which also governs the existence of the federal right of removal, in a way that conflicts with applicable state law.

The decision holds that total strangers to a publication, whose names are placed on it without their knowledge or authority by one with whom they have no agency or other relationship, may reasonably be held to incur liability for libel in the publication by remaining silent in the face of a demand for a retraction, if an organization of which they are officers is subsequently benefited by the publication. The Court's conclusion that the "question of liability" is "a close one", which "could go either way" under the law of Alabama is based primarily upon the rule declared by the Alabama Supreme Court in *Birmingham News Co.* v. *Birmingham Printing Co.*, 209 Ala. 403, 96 So. 336 and reaffirmed in *Goldfield* v. *Brewbaker Motors, Inc.*, 74 So.

2d 797, *cert. denied*, 54 So. 2d 800 (Appendix, *infra*, p. 39). The rule of those decisions is, however, patently inapplicable to this case. Both *Birmingham News* and *Goldfield* involved contract claims, not an asserted liability for tort, and least of all for defamation. Moreover, they involved situations where there was a pre-existing and continuing relationship between the defendants and the purchaser whose contract the defendant was asserted to have ratified.

The Alabama rule in tort is that declared in *Burns* v. *Campbell*, 71 Ala. 271, reaffirmed in *W. E. Belcher Lumber Co.* v. *York*, 245 Ala. 286, 17 So. 2d 281, on which the District Court relied (R. 182-3; Appendix, *infra*, pp. 25-26) but which are not referred to in the Court of Appeals' opinion. Under these decisions, it is only where "the relation of agency exists, and the principal derives a benefit from an act beyond the scope of the agency," that "the principal will be held to have ratified such unauthorized act by acquiescence, if, after being fully informed of what has been done, he fails to express his dissatisfaction within a reasonable time." Even then the principal is not "fully informed of what has been done" unless he is "fully informed of its tortious character". 245 Ala. at 288.

The distinctions between tort and contract cases and between the situation where there is and there is not a pre-existing agency or similar continuing relationship are not, moreover, unique to the law of Alabama. They pervade the decisions everywhere throughout the country, reflecting the important difference between liability arising from consensual transactions, including the selection of an agent, and liability based solely on the perpetration of a wrong by someone else. See 150 A. L. R. 1349; *Restatement, Agency* 2d, Reporter's Note to Section 94, pp. 169-172. It is especially to be respected in a libel action, we submit, where if the law were to require disavowals by

those innocent of publication, it would create difficulties of the kind so patently presented in this case.

There are, to be sure, rare instances in which a liability for defamation has been based upon mere non-feasance of the defendant, such as failure to remove a libel posted on one's premises, but they all rest upon a special power and resulting duty of control. See *Tidmore* v. *Mills*, 32 So. 2d 769 (Ala. App.); *Hellar* v. *Bianco*, 111 A. C. A. 435, 244 P. 2d 757 (Cal. App.); *Fogg* v. *Boston & Lowell R. R.*, 148 Mass. 513, 20 N. E. 109. Both courts below correctly deemed such cases inapposite here. No less irrelevant are cases dealing generally with silence as an admission of an accusation. See 4 *Wigmore, Evidence* § 1071 (3d ed. 1940). The District Court found as a fact that failure to retract or disavow did not admit prior consent to publication; and that the uncontradicted evidence showed that the resident defendants did not in fact authorize the publication or the using of their names. That finding was binding upon and was accepted by the Court below. *Cf. Guzman* v. *Pichirilo*, 369 U. S. 698.

There remains, therefore, only the action of the trial court in the *Sullivan* and *James* cases, in submitting the issue of ratification to the jury, to impeach the District Court's conclusion on the law of Alabama. The Court of Appeals explicitly did not base its decision "solely on this fact", in recognition of the point that *nisi prius* state court rulings are not binding on federal courts (*King* v. *Order of United Commercial Travelers of America*, 333 U. S. 153). Its opinion does, however, state that "there is no reason why their rulings may not be considered on the question of good faith in a matter such as this" (Appendix, *infra*, p. 37).

We submit that the District Court was right in disregarding the *Sullivan* ruling on the ground that it is con-

trary to Alabama law, as declared by the highest court in *Burns* and *Belcher*, *supra*. Indeed, if the erroneous ruling of the state trial court were given weight in passing upon claims of fraudulent joinder, the protection of non-resident defendants, which the removal is designed to afford, would be defeated in the cases where it is required most, such as the situation here.

The subsequent affirmance of the *Sullivan* judgment against the resident defendants did not, moreover, add the slightest sanction to the trial court's ruling in that case. The Supreme Court of Alabama deemed neither the sufficiency of the evidence against these defendants nor the correctness of the instruction as to ratification properly before it on appeal and did not, therefore, pass upon these issues. See *The New York Times Company* v. *Sullivan*, 144 So. 2d 25, 45, 46.

Thus the *Sullivan* decision does not influence the answer to the question here presented. It does, however, emphasize its grave importance at this time.

II

The decision that there is a reasonably arguable case against the resident defendants not only conflicts with state law, as evidenced by the applicable decisions of the Supreme Court of Alabama. It also attributes to the State the possible adoption of a rule of liability so burdensome and arbitrary in its impact on personal liberty that it would be repugnant to the Fourteenth Amendment.

The Court of Appeals has held that a State may reasonably cast on persons whose only connection with a publication is that their names were used without their knowledge or authority, the duty to retract or disavow the publication on demand, under pain of punitive award of damages, if

a jury should construe their silence as approval of statements deemed to constitute a defamation. We think it clear that such a rule of liability would, if adopted by a State, infringe due process limitations. It would impose a burden of investigation and appraisal far more onerous and arbitrary than the affidavits, the requirement of which was held to violate due process in *Louisiana* v. *N.A.A.C.P.*, 366 U. S. 293 and *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. It would exert compulsion to make a disclosure of belief no less invidious than that condemned in *Board of Education* v. *Barnette*, 319 U. S. 624, 634, or less restrictive than the limitation upon anonymity held to abridge free speech in *Talley* v. *California*, 362 U. S. 60. See also *Bates* v. *City of Little Rock*, 361 U. S. 516; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; *Shelton* v. *Tucker*, 364 U. S. 479, 488. It would condemn mere passivity with less justification than the registration ordinance held incompatible with due process in *Lambert* v. *California*, 355 U. S. 225 or the punishment of disposition found invalid in *Robinson* v. *California*, 370 U. S. 660.

The arbitrary operation of the rule is well illustrated by the present case. The names of the resident defendants were not even included in the list of signatories to the text embodying the alleged libels but rather in a separate list of names under the separate statement that "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal" (R. 14). The "appeal" was, of course, the appeal for funds for the defense of Martin Luther King, the support of the "embattled students" and the "struggle for the right to vote"—causes which the defendants may be assumed to support. What were they required to do or say, when they were served with the demand to publish a retraction, to avoid the liability which the Court of Appeals has held may reasonably be imposed?

Neither the charge of the trial Court in *Sullivan* nor the opinion of the Court below provides an answer which, in our view, comports with constitutional protections.

This contention is included in the questions sought to be presented by the resident defendants in their petition for a writ of certiorari to review the judgment in the *Sullivan* case. See *Abernathy et al.* v. *L. B. Sullivan*, No. 609, this Term. We believe the question calls for the consideration of this Court on that petition and that it should be considered in this case as well.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF ALABAMA,

NORTHERN DIVISION

FILED
Jun 26 1961
R. C. DOBSON
Clerk

By ..... *Deputy Clerk*

FRANK W. PARKS,
Plaintiff,

vs.

THE NEW YORK TIMES COMPANY, a corporation, RALPH D. ABERNATHY, FRED L. SHUTTLESWORTH, S. S. SEAY, SR., and J. E. LOWERY,
Defendants.

CIVIL ACTION
No. 1706-N

JOHN PATTERSON,
Plaintiff,

vs.

THE NEW YORK TIMES COMPANY, a corporation, MARTIN LUTHER KING, JR., FRED L. SHUTTLESWORTH, J. E. LOWERY, RALPH D. ABERNATHY, and S. S. SEAY, SR.,
Defendants.

CIVIL ACTION
No. 1707-N

MEMORANDUM OPINION

The above-captioned cases were submitted to this Court on April 26, 1961, upon the plaintiffs' separate and several motions, seeking to have this Court remand these causes to the Circuit Court of Montgomery, Alabama, State of Alabama, from whence each had been removed by the defendant The New York Times Company on April 13, 1961. Subsequent to this submission, this Court on May 24, 1961, ordered that Martin Luther King, Jr., one of the resident defendants in the case where John Patterson is a plaintiff, submit to oral interrogation by deposition. This action by

the Court was necessitated by reason of the representations to this Court by counsel in the John Patterson case to the effect that they expected to prove—upon trial—that Martin Luther King, Jr., was the president of the Southern Christian Leadership Conference, of which the other individual defendants are members of the executive committee, and that the individual defendants in each of these cases, through the Southern Christian Leadership Conference, specifically or impliedly authorized or ratified the publication of the alleged libelous article that forms the basis for these two actions. The testimony of the witness King was taken as directed, and has been considered by this Court along with the other testimony in evidence upon the separate and several motions.

The plaintiff in each of these cases is a resident citizen of the State of Alabama and was such at the time of the institution of each of these cases. In the Frank W. Parks case, the plaintiff sued the defendant The New York Times Company, a New York corporation, and Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, in the Circuit Court of Montgomery County, Alabama, for damages claimed to have been incurred on March 29, 1960, by reason of the publication of an alleged libelous article in The New York Times, a newspaper published by The New York Times Company. The New York Times Company is a nonresident corporation having its principal place of business in the City and State of New York. The individual defendants are resident citizens of the State of Alabama and were such at the time this suit was brought. In the John Patterson case, the plaintiff is a resident citizen of the State of Alabama and was such at the time of bringing this action. Plaintiff in that case sues the same defendants as are sued in the Parks case, with the addition of Martin Luther King, a resident citizen of the State of Georgia.

A brief chronological history of these cases is essential to an intelligent understanding of the questions presented by the motions to remand. In the Parks case, the action was filed in the Circuit Court of Montgomery County,

Alabama, on April 19, 1960. Service is claimed to have been effected on the defendant The New York Times Company on or about April 21, 1960. The defendant The New York Times Company removed this case to this Court on April 13, 1961. On the same date, the plaintiff filed his motion to remand this action to the State court. In the Patterson case, the action was filed in the State court on May 30, 1960. Service was claimed to have been obtained on the defendant The New York Times Company on or about June 1, 1960. This case was removed to this Court by the defendant The New York Times Company on April 13, 1961, and the plaintiff on April 20, 1961, filed his motion to remand to the State court. A similar case styled L. B. Sullivan, Plaintiff vs. The New York Times Company, a corporation, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, Defendants, was tried in the Circuit Court of Montgomery County, Alabama, commencing November 1, 1960. The Sullivan case terminated on or about November 3, 1960, with a verdict and judgment in favor of the plaintiff against all defendants. The basis for plaintiff's action in the Sullivan case was the same alleged libelous article that forms the basis for the plaintiff's action in each of these cases now before this Court. In the Sullivan case, the defendant The New York Times Company, subsequent to a jury verdict against it in the State court, filed with the State court a motion for a new trial, and that motion was denied by the State court on March 17, 1961.

The basis for the motion to remand in each of these cases is that this Court is without jurisdiction to hear and determine each case for the reason that the petition of The New York Times Company for removal was not filed in this Court, as required by statute, within twenty days after the receipt by the defendant The New York Times Company of a copy of the pleading setting forth the claim for relief by plaintiff in each case; further, that the individual defendants, with the exception of King in the Patterson case, are resident citizens of the State of Alabama and therefore there is no diversity within the meaning of Title

28, § 1332, United States Code Annotated. No question arises by reason of either of these motions as to the amount in controversy.

The theory of the defendant The New York Times Company in removing each of these cases to this Court is that at all times material to this litigation the defendant The New York Times Company was a corporation organized and existing under the laws of the State of New York with its principal place of business in New York City; that these cases are actions for damages against the defendants arising out of an alleged libel of the plaintiff in each case by the defendants on or about March 29, 1960; that this Court has jurisdiction in each of these cases under § 1332, Title 28, United States Code Annotated, by reason of the diversity of citizenship between the plaintiff in each case and the defendant The New York Times Company but for the fraudulent joinder of the individual defendants (with the exception of King, a resident of the State of Georgia), who are resident citizens of the State of Alabama; that the joinder by the plaintiff in each case of the defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery, was fraudulent, because there was at the time of the commencement of each of these actions and also at the time of the removal of same no reasonable basis under the law of Alabama upon which the liability of said individual defendants to the plaintiff in either case could be established for and on account of the alleged libelous publication made the basis for each action; and that the said resident defendants were joined in each of these cases for the sole purpose of fraudulently preventing the petitioner The New York Times Company from removing these cases to the United States District Court for trial. The New York Times Company says, further, that it did not sufficiently appear that either of these cases was removable because of the fraudulent joinder of the resident defendants until after the trial in the Circuit Court of Montgomery County, Alabama, of the Sullivan case and until after the State court had overruled the motion of The New York Times Company for a new

trial in that case and, further, until it became apparent that the plaintiff in each of these cases had no reasonable basis upon which the liability of said individual defendants could be established.

This Court, in each of these cases, in an effort to determine whether there is any legal basis whatsoever for the claim asserted against the resident defendants, has painstakingly studied all the evidence submitted and available, including a transcript of the trial in the Sullivan case. This Court reaches the conclusion that from the evidence presented upon the motion to remand in each of these cases there is no legal basis whatsoever for the claim asserted against the resident defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery. From the facts available to this Court, no liability on the part of the four resident defendants existed under any recognized theory of law; this is true even with the application of the Alabama "scintilla rule." Their joinder in each of these cases was therefore fraudulent as that term is applied in removal cases. The use of the term "fraudulent" in such instances is in the legal sense and not in the ordinary sense. Whenever in any case a plaintiff joins resident and nonresident defendants, the nonresident is privileged by statute to remove the action to the district court and challenge the good faith of the plaintiff in joining the resident defendants. In such instances, the removing-defendant has the burden of showing that the joinder was made without any reasonable basis and solely to defeat removal; this was the procedure followed by this Court in these cases. The defendant The New York Times Company in each of these cases sustained that burden by clear and convincing evidence that compels the conclusion that the joinder in each of these cases of the resident defendants was without any reasonable legal ground. In such cases, where it is clear from the evidence that the resident defendants cannot be liable to the plaintiff on any reasonable legal ground, the plaintiff is suing improperly and the federal court should not hesitate to retain jurisdiction after removal by the nonresident defend-

ant. See *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146, wherein it was stated:

> "A civil case, at law or in equity, presenting a controversy between citizens of different States and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599, 601; *Alabama Southern Railway Co.* v. *Thompson*, 200 U. S. 206, 218; *Wecker* v. *National Enameling Co.*, 204 U. S. 176; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316. So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith, as was the case in *Wecker* v. *National Enameling Co.*, supra. * * *"

See also *Dudley* v. *Community Public Service Company*, CCA 5, 1940, 108 F. 2d 119.

The basis for this Court's firm conclusion that the joinder of the resident defendants was fraudulent in a legal sense, because there was no reasonable basis under the law of Alabama upon which the liability of the individual defendants to either plaintiff could be established for and on account of the alleged libelous publication that is made the basis for each of these actions, is as follows:

There is no dispute as to what the evidence at the Sullivan trial showed as to the alleged sponsorship by the resident defendants of the alleged libelous article. In the cases now before this Court, neither plaintiff contends that

at a trial of this action he could or would offer any additional testimony, with the exception of the plaintiff Patterson, who, through his attorneys, contended that he expected the evidence to develop from the defendant King that King was the president of the Southern Christian Leadership Conference, of which the other individual defendants were members of the executive committee, and that said individual defendants through the Southern Christian Leadership Conference specifically or impliedly authorized or ratified the publication of the alleged libelous article. The evidence shows that the article in question was placed in The New York Times by an individual named John Murray, who was acting for a committee to defend Martin Luther King, Jr. Murray inserted the names of the four resident defendants as sponsors of the article. They were neither officers nor members of the committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted. On the question of authorization and ratification in instances such as this Court is now concerned with, the law of Alabama is well stated by the Supreme Court of Alabama in *W. E. Belcher Lumber Co.* v. *York*, 1944, 245 Ala. 286, 17 So. 2d 281, where the Alabama court stated:

> "Let us set out here the principle of ratification which will support a suit in trespass where it was by an agent without authority. It is thus stated in Burns v. Campbell, 71 Ala. 271, at pages 289, 290:
>
> " 'There is no difficulty about the general rules of law governing the ratification of an agent's unauthorized act by a principal. It is settled that where such

an agent, acting in the name and for the benefit of his principal, commits an unindictable trespass de bonis asportatis, or, in other words, a trespass which is voidable merely and not wholly void, as imposing a civil and not a criminal liability upon the perpetrator, the principal, after being fully informed of its tortious nature, may adopt it as his own act, and such ratification ordinarily binds the principal to the same extent, and holds him to the same civil responsibilities as if he had originally authorized it. And for many purposes the ratification will relate back to the date of the unauthorized act so as to constitute the principal a 'trespasser ab initio.'

"'But to hold the principal responsible for damages, in such cases, it must appear that he ratified the wrongful act of the agent with a full knowledge of its tortious character. Street v. Sinclair, supra, 71 Ala. 110; Lienkauf v. Morris, 66 Ala. 406. The mere appropriation of the fruits of the trespass without such knowledge, would not be sufficient. Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

"'Where the relation of agency exists, and the principal derives the benefit from an act beyond the scope of the agency, the principal will be held to have ratified such unauthorized act by acquiescence, if, after being fully informed of what has been done, he fails to express his dissatisfaction within a reasonable time. Mobile & M. Rwy. Co. v. Jay, 65 Ala. 113. There are many cases, however, where mere silence, or non-interference will not amount to a ratification. Whart. Agency, § 86; 2 Greenl. Ev. § 66.'"

The only question now remaining is whether the defendant The New York Times Company timely removed these cases to this Court. Actions are removable generally in accordance with the provisions of Title 28, § 1441, United States Code Annotated. Ordinarily the petition for removal shall be filed "within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief

upon which such action or proceeding is based, ...'"[1] Thus, in the ordinary case the plaintiff holds the key to the removability. He may stay out of federal court by failing to claim the requisite amount or by naming in good faith resident defendants. However, where upon removal there is presented the question of fraudulent joinder the legal principles are different. *Great Northern Ry. Co.* v. *Alexander*, 246 U. S. 276. See also *Alabama Southern Ry.* v. *Thompson*, 200 U. S. 206. In such instances of fraudulent joinder, there is no rigid twenty-day period which applies, and the courts will accept and should accept petitions filed within a reasonable time after the right to removal becomes apparent (that is, after the fraudulent joinder becomes evident).

From the evidence presented to this Court upon these motions, this Court is of the opinion, and so finds, that The New York Times Company filed its petition to remove in each of these cases within a reasonable time after it became apparent that the plaintiff in each of these cases had no legal basis for proceeding against the resident defendants, and the defendant The New York Times Company, after such became evident and on April 13, 1961, promptly removed each of these cases to this Court. There is no contention by either plaintiff here that The New York Times Company could have or should have petitioned this Court for removal within twenty days of the receipt of the complaints in April and May, 1960. This is true, since insofar as The New York Times Company then knew, the resident defendants were, in fact, sponsors of the alleged libelous article and were properly joined as defendants.

The requirement as to the time for removal in "fraudulent joinder" cases is not jurisdictional, and the time will be extended by the federal courts in such instances. This rule was laid down by the Supreme Court of the United States in *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92, where it was stated:

> "But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley,

[1] Section 1446, Title 28, United States Code Annotated.

'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel.''

As to the same principle laid down in the *Powers* case, see the Fifth Circuit case of *United States* v. *Fidelity and Casualty Company of N. Y.*, 218 F. 2d 503, where it was stated:

> "However, the time limitation prescribed by the removal statute within which a petition for removal may be filed is not jurisdictional, but is merely modal and formal, and failure to file the petition within the allotted time may be waived, or objection to such failure may be precluded by estoppel."

The test in delayed removals because of "fraudulent joinder" is whether the time is reasonable. This Court specifically finds that in each of these cases the removal to this Court on April 13, 1961, was within a reasonable time after it could have and should have become apparent to the defendant The New York Times Company that there was no reasonable basis under the law of Alabama upon which the liability of the individual defendants could be established for and on account of the alleged libelous publication made the basis for plaintiffs' actions. In this connection, see *Yulee* v. *Vose*, 99 U. S. 539; *Powers* v. *Chesapeake & Ohio Railway*, supra; *Kansas City Suburban Belt Ry. Co.* v. *Herman*, 187 U. S. 63; *Remington* v. *Central Pacific R.R. Co.*, 198 U. S. 95, and the opinion of Judge Grooms in the Northern District of Alabama in February, 1961, in *Fidelity & Casualty Company of N. Y., a Corporation, etc.*, v. *Safeway Steel Scaffolds Co., a Corporation, et al.*, 191 F. Supp. 220. This Court does not consider it necessary for an adjudication of the questions now presented by these motions to remand; but it is appropriate, however, to observe that the plaintiff in each of these cases is, in the opinion of this Court, estopped to assert that the removal petition of the defendant The New York Times Company in each of these cases was not timely filed. See *Ayers* v. *Watson*, 1885, 113 U. S. 594; *Northern Pacific*

Railroad Co. v. *Austin*, 1890, 135 U. S. 315; *Martin* v. *Baltimore & Ohio Railroad*, 1894, 151 U. S. 673; *Powers* v. *Chesapeake & Ohio Ry. Co.*, CCA 6, 1895, 65 F. 129; *Fritzlen* v. *Boatman's Bank*, 1909, 212 U. S. 364; *Wright* v. *Missouri Pacific R. Co., et al.*, CCA 8, 1938, 98 F. 2d 34; *Weeks* v. *The Fidelity & Casualty Company of N. Y.*, CCA 5, 1955, 218 F. 2d 503.

In accordance with the foregoing, this Court specifically finds and concludes that the joinder by each of these plaintiffs of the resident defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery, was fraudulent as that term is used in a legal sense in removal cases, and that the removal of each of these actions to this Court on April 13, 1961, was timely and proper. Formal orders will be entered accordingly.

Done, this the 26th day of June, 1961.

FRANK M. JOHNSON, JR.
United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19112

FRANK W. PARKS and JOHN PATTERSON,
Appellants,

versus

THE NEW YORK TIMES COMPANY,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

(September 18, 1962)

Before BROWN and BELL, Circuit Judges and AINSWORTH, District Judge.

BELL, Circuit Judge: This appeal is from an interlocutory order of the District Court pursuant to Title 28 USCA, § 1292(b) denying motions to remand. The opinion of the District Court which accompanied the order is reported in 195 F. Supp. 919 (M.D. Ala., 1961). The separate cases of the two appellants were consolidated for hearing in the District Court and here on appeal.

Appellant Parks sued The New York Times Company, a non-resident of Alabama and four individual residents in the Circuit Court of Montgomery County, Alabama for libel growing out of an advertisement appearing in the

March 29, 1960 issue of The New York Times. The names of the resident defendants appeared as endorsers of the material contained in the advertisement. The suit of appellant Patterson was in the same court and on the same basis. A more complete statement of the background facts is set out in our decision on a suit brought by the resident defendants against appellant Patterson seeking relief, inter alia, from the consequences of these and other libel suits. *Abernathy et al. v. Patterson*, 5 Cir., 1961, 295 F. 2d 452.

The question before us is whether appellee, The New York Times Company, could remove the suits of appellants to the Federal Court. The statutory period within which to remove had long since expired. Title 28, § 1446(b). Removal was sought under the doctrine of fraudulent joinder of the resident defendants. And, of course, the merits of the case including whether the advertisement was in fact libelous are not before us.

Five libel suits arose from the advertisement. All were filed in the state court against appellee and the four individual defendants, except that in the Patterson suit a Georgia resident was also named as a party defendant. The plaintiffs in the respective suits were Patterson, the Governor of Alabama, three city commissioners of Montgomery, Messrs. Sullivan, James and Parks, and Sellers, a former city commissioner.

The Sullivan and James cases have been tried. A $500,000 verdict for plaintiff against all of the defendants was rendered in the Sullivan case on November 3, 1960. A like verdict was rendered in the James case February 1, 1961. A motion for new trial filed by The Times was denied on March 17, 1961 and that case is now on appeal in the Supreme Court of Alabama. A similar motion in the James case was pending when these cases were removed on April 13, 1961.

The petition for removal was based on diversity of citizenship between the plaintiffs in each case and The New York Times Company, Title 28, § 1441(a). We are not concerned with removal of an action based on the constitution or laws of the United States, nor is there any claim of a

separate or independent claim being joined. Title 28, USCA, § 1441(b)(c). It was the position of The Times that it did not know of the fraudulent joinder until after the trials of the Sullivan and James cases in the state court when it became clear from uncontroverted evidence that the resident defendants had not in any manner authorized or consented to the using of their names as endorsers of the advertisement which gave rise to the alleged libel. The motions to remove set out explicitly that it became apparent to The Times after these trials and after the argument of counsel for plaintiffs to the juries therein that the theory of liability against the resident defendants was based on an assumed duty on the part of the resident defendants to disavow any connection with the advertisement.

The District Court determined that there had been a fraudulent joinder and denied the motions to remand. The evidence before the court on the motions was that adduced in the Sullivan case, as contained in a transcript of that trial introduced by agreement, the deposition of the Georgia defendant in the Patterson case which the trial court ordered taken ex moro motu by a court appointed amicus curiae. He also concluded that The Times had acted timely in the premises, a question we do not reach.

We take as a general guideline the admonition of the Supreme Court in *Shamrock Oil & Gas Corp.* v. *Sheets*, 1940, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214, a unanimous opinion, in reference to the administration of the removal statutes:

> "... The Power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy* v. *Ratta*, 292 U.S. 263, 270, 78 L.ed. 1248, 1253, 54 S.Ct. 700;"

And the rule applicable to fraudulent joinder as it obtains in this case was set out for this court in an opinion by Judge Sibley in *Dudley* v. *Community Public Service*, 5 Cir., 1939, 108 F. 2d 119, a case involving a petition for removal where a resident was joined with a non-resident defendant and doubt existed as to the liability of the resident defendant because of lack of exact precedent:

> "... We therefore hold that on the allegations of the petition there appears to be a probable case in law against Short, as well as against the Community Public Service Company, notwithstanding the application to them of the Compensation Act. By consequence it does not appear that Short was fraudulently joined. See *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544. That the defeat of removal might have been a motive in joining Short is not important, if in good faith he is sought to be held liable. *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A.L.R. 904, and cases cited. Though for lack of an exact precedent there may be doubt whether Short is legally liable, that would not render his joinder fraudulent. *Morris* v. *E. I. Dupont Co.*, 8 Cir., 68 F. 2d 788; *Wells* v. *Missouri Pac. R. Co.*, 8 Cir., 87 F. 2d 579. The case ought to have been remanded for trial in the State courts."

Cf. *Stone* v. *Foster*, N. D. Ark., 1958, 163 F. Supp. 298, where removal on the basis of fraudulent joinder was premised on the fact that no case was made out in the state court where the trial resulted in a mistrial against the defendants. The motion to remand was granted principally because the case against the resident defendant was submitted by the court to the jury. There was no directed verdict in his favor and the court felt that there must have been some testimony sufficient in the opinion of the Arkansas State Court to sustain a verdict for the plaintiff against the resident defendant.

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Schwyhart*, 1913, 227 U.S. 184, 33 S.Ct. 250, 57 L.Ed. 473, Mr. Justice

Holmes speaking for the court in an unanimous opinion laid down the following applicable rule:

> "On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied."

Morris v. *E. I. Dupont de Nemours & Company*, 8 Cir., 1934, 68 F. 2d 788 teaches that the determination of fraudulent joinder is to be based on whether there was a real intention on colorable grounds to procure a joint judgment. Doubt as to whether under the state law a case of joint liability is stated, or doubt with respect to the allegations concerning the resident defendants being false as when the question depends upon the credibility of witnesses or the weight of evidence will not render the joinder fraudulent. On the other hand, there must be some reasonable basis for believing that there is joint liability. The joinder is fraudulent if it is clear that, under the law of the state in which the action is brought, the facts asserted by the plaintiff as the basis for the liability of the resident defendant could not possibly create such liability so that the assertion of the cause of action is as a matter of local law plainly a sham and frivolous. And a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of plaintiff that there was joint liability.

Wells v. *Missouri Pacific R. Co.*, 8 Cir., 1937, 87 F. 2d 579, holds that the burden on a motion to remand to the state court is on the party who removed to the federal court, and that a complaint in the state court is good as against a motion to remove if it evidences a real intention to get a joint judgment, and if colorable ground for such judgment is shown. It follows *Morris* v. *Dupont*, supra, in the view that doubtful issues of law due to absence of definite pronouncements by the state supreme court are to be tried in the court having original jurisdic-

tion of the case and are not to be determined in a removal proceeding.

The doctrine is stated as follows in Moore's Commentary on the United States Judicial Code, Par. 0.03 (35), p. 234-236:

> "... The usual case in which charges of fraudulent joinder are made is that in which the plaintiff, a citizen of the state of the forum, joins a resident citizen with a non-resident defendant. Whether the joinder is fraudulent or not is said to depend on whether the plaintiff really intended to obtain a judgment against both defendants . . . The joinder may be fraudulent if the plaintiff fails to state a cause of action against the resident defendant, and the failure is obvious according to the settled rules of the state. If there is doubt as to whether the plaintiff has stated a cause of action, the joinder is not fraudulent, and the cause should be remanded . . . If the plaintiff has stated a cause of action against the resident defendant, that is normally sufficient to prevent removal. The motive for joining such a defendant is immaterial, even when the defendant is judgment-proof, or when the plaintiff is ultimately found not to have had a cause of action against the defendant. Bad faith in bringing the action is not material; bad faith in the joinder is necessary. The defendant may show bad faith in joinder by proving that the plaintiff stated the facts knowing them to be false, or with enough information within reach so that he should have known them to be false."

A claim of fraudulent joinder must be pleaded with particularity, and supported by clear and convincing evidence. Barron and Holtzoff, Federal Practice and Procedure, § 103, p. 478, citing *McLeod v. Cities Service Gas Company*, 10 Cir., 1956, 233 F. 2d 242. That case holds that bad faith in joining a resident defendant for the sole purpose of preventing removal may be shown by any means available but must be proven with certainty. The denial of remand was affirmed as not being clearly erroneous.

We pointed out in *Bentley v. Halliburton Oil Well Cementing Company*, 5 Cir., 1949, 174 F. 2d 788, that the doctrine of fraudulent joinder had its inception in the courts, and originally was a judicial pronouncement intended to protect non-resident defendants from any misstatement of fact or misjoinder of parties or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to a federal court. That case also points out what we think still to be the law; absent fraudulent joinder, plaintiff has the right to select the forum, to elect whether to sue joint tortfeasors and to prosecute his own suit in his own way to a final determination.[1]

On the strength of these authorities, and for the purposes of this case, we take the rule to be that there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard. One or the other at least would be required before it could be said that there was no real intention to get a joint judgment, and that there was no colorable ground for so claiming. *Chicago, Rock Island & Pacific Ry. Co.* v. *Schwyhard*, supra. And we measure the decision of the District Court against it.

The state trial judge in Sullivan permitted the question of ratification to go to the jury over the objection of the

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[1] In *Weeks v. The Fidelity and Casualty Company*, 5 Cir., 1955, 218 F. 2d 503, we considered § 28 USCA, 1446(b) as being a congressional enactment to make uniform the time for filing petitions for removal, but the time limitation as being merely modal or formal and not jurisdictional.

And fraudulent joinder is to be distinguished from cases which become removable because of some action on the part of the plaintiff such as dismissing the resident defendant. *Powers v. Chesapeake & Ohio Railway Company*, 169 U. S. 92, 18 S. Ct. 264, 42 L. Ed. 673. This case also stands for the proposition that a cause may be removed when such occurs, and this would include discovery of fraudulent joinder if the petition to remove is filed at the earliest possible opportunity after the action assumes the shape of being removable.

resident defendants of insufficiency of evidence.[2] This alone, in the ordinary case is probably enough to avoid a charge of fraudulent joinder. Cf. *Stone* v. *Foster*, supra. Although decisions of nisi prius courts are not binding on us as precedents in applying local law in diversity cases, *King* v. *Order of United Commercial Travellers of America*, 1948, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608, there is no reason why their rulings may not be considered on the question of good faith in a matter such as this.

But we need not, and do not rest our decision solely on this fact. The evidence before the District Court on the motions showed that, although the names of the resident defendants appeared on the advertisement, they denied any knowledge of the advertisement until they received letters demanding retraction some two weeks later. They denied having consented to the publication of the advertisement and this was corroborated by the testimony of the witness who added their names to the advertisement as endorsers, that he did so without communicating with them. They failed to respond in any way to the letters

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[2] At the conclusion of the evidence in the Sullivan case the resident defendants moved for an affirmative charge [directed verdict] on the ground of insufficiency of evidence to connect them with the advertisement. This was denied and the question of ratification or adoption of the advertisement was submitted to the jury on the following charge:

"Now, it is the contention of the plaintiff here that although you may believe, as to the four individual defendants, that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff, Sullivan, that the four individual defendants after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names, that is, that they approved and sanctioned this advertisement. In other words, the plaintiff, Sullivan, insists that there was a ratification of the advertisement and the use of their names as signers of the advertisement by the four individual defendants and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous authorization and is a confirmation or approval of what has been done by another on his account. Now, it is for you twelve jurors to say from all the evidence whether the four defendants ratified the advertisement now before you, that is, ratified the advertisement as I have defined the word ratification to you."

of retraction and never repudiated, renounced or disavowed the use of their names, or the advertisement itself.

The plaintiffs rely for their case on ratification or adoption on the silence of the resident defendants under circumstances requiring a denial. Other than the silence, the only evidence which in any way substantiates ratification is the sworn complaint filed by the resident defendants in *Abernathy v. Patterson*, supra, in which it is alleged that the advertisement was for their benefit and support, and the deposition of the Georgia defendant in the Patterson case in which the testimony was that an organization, of which he was president and in which the resident defendants were officers, received some of the funds raised through the medium of the ad.

The question would be whether the silence in the face of the inculpatory charges contained in the demand for retraction together with the circumstances that the advertisement was for the benefit of plaintiffs and that some of the funds derived therefrom went to the organization through which plaintiffs carry on their activities rose to the level, as a matter of law, of a sufficient basis from which a jury could infer ratification or adoption. The state trial judge in effect ruled that it did. In a proceeding of this nature we need not decide the question. We need only decide whether there was a reasonable basis in law and fact for such a contention in the state court suits. Stated differently, was there substance to the claims?

In 53 C.J.S., Libel and Slander, § 149, the question is treated as follows:

> "... One who adopts or recognizes the publication of a libelous article purporting to emanate from him may be liable therefor; but mere silence on the part of one in whose name a libel is unauthorizedly published will not render him liable."

The authority for this first statement is *Plecker v. Knottnerus*, 1926, 201 Iowa 550, 207 N.W. 574. There the defense to a libel based on a charge of insanity of plaintiff was that defendant signed without knowing the contents of the

document. The act of the defendant in testifying in support of the charge and in failing to withdraw the charge or attempt to dismiss it was held sufficient to show adoption of the libel. The latter statement is based on *Simmons v. Holster*, 1868, 13 Minn. 249; and *Dawson v. Holt*, 1883, 11 Lea (Tenn.) 583, 47 Am. Rep. 312. It is expressly pointed out in *Simmons* that the defendant sought to be held received no benefit from the libel. *Dawson v. Holt*, on the contrary, is to the effect that there is no duty upon the innocent person in such circumstances to disavow.

In the case of *Goldfield v. Brewbaker Motors, Inc.*, Ala. Court of Appeals, 1951, 54 So. 797, Cert. Den., 54 So. 2d 800, a case involving an unauthorized purchase of an automobile by a wife in which the husband attempted to recover the automobile traded in, the evidence was that the husband talked with the automobile dealer several times without attempting to rescind the contract. The verdict and the judgment in the trial court for the dealer was affirmed on appeal. The court with reference to the doctrine of ratification adopted the doctrine enunciated by the Supreme Court of Alabama in *Birmingham News Co. v. Birmingham Printing Co.*, 1923, 209 Ala. 403, 96 So. 336, as follows:

> "Intention, express or implied, to ratify an unauthorized act is a material factor in an inquiry of ratification vel non by an asserted principal; and the intent requisite may be inferred where there is evidence tending to show that the asserted principal, with adequate knowledge of the facts and circumstances, so conducted himself as to evince his purpose to confirm or adopt the unauthorized act of another."

In the *Birmingham News* case ratification was claimed on the basis of several statements of account having been sent it for goods sold to another who had an office in the Birmingham News building and was engaged in a business enterprise with that company. The News remained silent in the face of receiving the statements. The court said that under the circumstances, if the News re-

mained silent beyond a reasonable period after the receipt of the statement with respect to its thus asserted responsibility in the premises, such silence was evidence from which ratification might be inferred by the jury. See also I Restat. of the Law of Agency 2d, § 94, p. 244, Comments (a) and (b), and Appendix to § 94, Vol. III, p. 168; and IV Wigmore on Evidence, 3rd ed., § 1071 on adoption of the statement of another through silence where the circumstances call for a denial, and where the purported agent was theretofore a stranger to the purported principal.

On the other hand, there are cases in Alabama holding that self serving declarations contained in an unanswered letter will not be treated as admitted. *Fidelity and Casualty Company of New York v. Beeland Mercantile Company*, S. Ct. Ala., 1942, 7 So. 2d 265. Cf. *Denson v. Kirkpatrick Drilling Company*, S. Ct. Ala., 1932, 144 So. 86. And the *Birmingham News* case, supra, makes it clear that more evidence is required to establish ratification where the unauthorized act is by one not an actual agent than where the act is by an agent in excess of his authority.

The facts and these authorities indicate that the question of liability of the resident defendants is a close one. It could go either way. But, in either event, there is sufficient substance in the position of appellants to withstand a claim of fraudulent joinder. Appellants had the right to select their forum. Appellee failed to prove fraudulent joinder. It was error to deny the motions for remand. Having so held, it is unnecessary to, and we expressly do not, rule on the question of whether the motions to remove were seasonably filed.[3]

REVERSED and REMANDED for further proceedings not inconsistent herewith.

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[3] By way of example, and citing the facts in the Parks case only, judgment was rendered in the Sullivan case on November 3, 1960. There was a stipulation between counsel on November 21, 1960 with reference to the transcript of the record in Sullivan, and in the Parks case, then pending, contemplating appeals to the Supreme Court of Alabama, which stipulation was approved by that court on December 9, 1960. There was a motion to quash service in the Parks case on December 16, 1960, which was denied on the same day. Interroga-

AINSWORTH, District Judge, dissenting:

Fraudulent joinder is said to occur in removal cases based on diversity of citizenship when there is no reasonable basis for believing there is joint liability between the resident and nonresident defendants. The joinder of resident defendants is thus said to be for the sole purpose of fraudulently preventing the nonresident from exercising its legal right to remove the case from the state court to the United States district court.[1] A conclusion that the

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tories were served on The Times on January 31, 1961 and it was stipulated that the answers in the Parks case would be the same as in the Sullivan case. The judgment in the James case was rendered on February 1, 1961. On February 10, 1961 The Times filed a motion asking notice of the time and place of selecting the jury venire in the state court for the Parks case which motion was granted on the same day. On March 31, 1961 the jury venire was drawn in the presence of counsel for The Times and the case was set for trial on the merits on May 1, 1961. On March 17, 1961 the motion for new trial in the Sullivan case was denied. Petitions to remove in Parks and Patterson were filed on April 13, 1961. Parks moved to remand on the same date while Patterson removed to remand April 20, 1961.

The motions to remove allege that the fraudulent joinder was known at the conclusion of the trials of the Sullivan and James cases. The District Court accepted the excuse for the long delay thereafter before filing the motions that counsel for The Times thought appellants here might produce some additional evidence and only gradually became aware that they would not, after which realization they moved promptly.

[1] The Constitution of the United States provides for diversity jurisdiction in the federal courts. Article III, Section 2, "The Judicial Power shall extend to all Cases . . . between Citizens of different States . . . ." Of course, the federal diversity jurisdiction was not limited to controversies commenced in the federal courts or the purpose of diversity jurisdiction would be defeated. Accordingly, the first Judiciary Act of 1789 contained provisions for removal from state courts to the federal courts, and a removal jurisdiction has existed ever since. 1 Stat. 73 § 12 (1789). In general see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 91 (1923). *Railway Co. v. Whitton*, 80 U. S. (13 Wall.) 270 (1871); *Gaines v. Fuentes*, 92 U. S. (2 Otto) 10 (1875), and *Tennessee v. Davis*, 100 U. S. (10 Otto) 257, 265 (1879), wherein the Court said: "It [removal] was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use since." However, the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U. S. 265, 3 Cranch 267 (1806), greatly curtailed federal diversity jurisdiction and afforded an opportunity for plaintiffs to defeat federal jurisdiction. *Strawbridge* necessitated the development of the principle of fraudulent joinder.

resident defendant was joined fraudulently is thereby justified. The burden of proof is on the defendant who seeks removal and it must be clear that under the law of the state in which the action is brought the facts asserted by plaintiff as the basis for liability against the resident defendant could not possibly create such liability, and the asserted claim is therefore a sham and frivolous. *Morris* v. *E. I. Dupont de Nemours & Company*, 8 Cir., 1934, 68 F. 2d 788. These are the legal principles of this court-made rule and with which there can be no dispute.

Where the joinder is without reasonable basis and it is clear that no liability exists on the part of the resident defendants, the joinder in a legal sense is held to be fraudulent. *Johnson* v. *Kurn*, 8 Cir., 1938, 95 F. 2d 629.

"On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied." *Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 1913, 227 U. S. 184, 33 S. Ct. 250, 57 L. Ed. 473. And removability is determined as of the time of removal. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586 (1938).

In this matter the district court "has painstakingly studied all the evidence submitted and available" and has reached the conclusion "that from the evidence presented upon the motion to remand in each of these cases there is no legal basis whatsoever for the claim asserted against the resident defendants"; and the trial judge found that the defendant, The New York Times Company, had sustained the burden of proof "by clear and convincing evidence that compels the conclusion that the joinder in each of these cases of the resident defendants was without any reasonable legal ground." 195 F. Supp. 919, 922. The record in this case consisted principally of the complete transcript of the trial in the companion *Sullivan* case, the King deposition, and the sworn complaint in *Abernathy v. Patterson* filed in the same United States district court as the instant proceedings.

The district judge carefully analyzed the evidence to determine if there was any reasonable basis under the law of Alabama upon which liability of the resident defendants could be established and he found as follows:

> "There is no dispute as to what the evidence at the Sullivan trial showed as to the alleged sponsorship by the resident defendants of the alleged libelous article. In the cases now before this Court, neither plaintiff contends that at a trial of this action he could or would offer any additional testimony, with the exception of the plaintiff Patterson, who, through his attorneys, contended that he expected the evidence to develop from the defendant King that King was the president of the Southern Christian Leadership Conference, of which the other individual defendants were members of the executive committee, and that said individual defendants through the Southern Christian Leadership Conference specifically or impliedly authorized or ratified the publication of the alleged libelous article. The evidence shows that the article in question was placed in The New York Times by an individual named John Murray, who was acting for a committee to defend Martin Luther King, Jr. Murray inserted the names of the four resident defendants as sponsors of the article. They were neither officers nor members of the committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted." 195 F. Supp. 919, 923.

The majority opinion apparently agrees with the principal findings of fact of the court below when it states: "Other than the silence, the only evidence which in any

way substantiates ratification is the sworn complaint filed by the resident defendants in *Abernathy v. Patterson*, supra, in which it is alleged that the advertisement was for their benefit and support, and the deposition of the Georgia defendant in the Patterson case in which the testimony was that an organization, of which he was president and in which the resident defendants were officers, received some of the funds raised through the medium of the ad." It then states the question, was there substance to the claims against the resident defendants in the state court suits?

I do not believe there was, for it is clear that the resident defendants had no knowledge of the insertion of the ad claimed to be libelous until several weeks after its publication. The resident defendants, though associated with Dr. King in the Southern Christian Leadership Conference, were not members of nor familiar with the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," which was responsible for insertion of the advertisement. The Conference and the Committee were entirely independent and separate groups and the resident defendants were not members of the Committee nor connected with it in any way. The King deposition disclosed that not even he authorized the use of his name in the advertisement in The New York Times (King deposition, page 80) nor does it appear that resident defendants in any way personally benefited from publication of the advertisement or the funds raised thereby, though some funds may eventually have been received by the Southern Christian Leadership Conference, of which they were officers. The circumstances here did not oblige them to issue a denial about the publication when demand for retraction was made by plaintiffs upon them. There is no evidence whatsoever on the part of the resident defendants of ratification by silence or otherwise of The New York Times' advertisement. In *Birmingham News*, 209 Ala. 403, 96 So. 336, cited by the majority, the Alabama Supreme Court held that "under the circumstances disclosed by the evidence" it would have been the duty of the defendant to communicate with the plaintiff within a reasonable time its

denial of liability of an item of charge against defendant for printing and if "under these circumstances" the defendant remained silent beyond a reasonable period after receipt of the bill the silence would evidence ratification. But the facts in the cited case are vastly different from those here.

The court below found the facts on the motion for removal, as it was obligated to do, under Rule 52(a) of the Federal Rules of Civil Procedure and unless these findings are "clearly erroneous" they should not be set aside. Findings of fact are not clearly erroneous unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. *Fleming v. Palmer*, 1 Cir., 1941, 123 F. 2d 749; Barron and Holtzoff, *Federal Practice and Procedure*, § 1133; *McLeod v. Cities Service Gas Company*, 10 Cir., 1956, 233 F. 2d 242. I believe the district judge's findings were supported by substantial evidence and are correct. The federal courts should be equally vigilant to protect the right to proceed in federal court as to permit the state courts in proper cases to retain their own jurisdiction; the duties of the court to exercise jurisdiction when conferred and not to usurp it when not conferred are of equal obligation. *Wecker v. National Enameling Co.*, 204 U.S. 176, 186; 27 S. Ct. 184 (1907); *Bank of the United States v. Deveaux*, 9 U. S. (5 Cranch) 61, 85 (1809).

I would therefore affirm the judgment of the district court in these cases.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 19,112

FRANK W. PARKS and JOHN PATTERSON,
Appellants

v.

THE NEW YORK TIMES COMPANY,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

ON PETITION FOR REHEARING (November 19, 1962)
BROWN and BELL, Circuit Judges and AINSWORTH, District Judge

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

AINSWORTH, District Judge: "I dissent".

U. S. COURT OF APPEALS
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 53

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 687.

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.[1]

OPINIONS BELOW.

The opinion of the Court of Appeals of September 18, 1962 (App. of Petition, p. 39), is reported in 308 F. 2d

[1] This brief is in behalf of both respondents, whose cases, as the decision below noted, were consolidated in the District Court

474. The memorandum opinion of the District Court (App. of Petition, p. 19) is reported in 195 F. Supp. 919.

JURISDICTION

Petitioner has sought to invoke this Court's jurisdiction under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Three plaintiffs filed companion common law libel suits in a state court against a foreign corporation and four resident defendants. Two plaintiffs won jury verdicts and state court judgments against all defendants. In the third case the foreign corporation, 335 days after the statutory period had expired, sought to remove the case to a federal district court alleging fraudulent joinder of the resident defendants because there was no reasonable basis for their liability under state law. The corporation's "proof" of fraud was the trial transcript of the first case. During this litigation, on review of that same transcript, the highest state appellate court has affirmed the verdict and judgment against these resident defendants, and a Federal Court of Appeals for the state has held that there is a case of substance against them under state law which could go either way.

In these circumstances, may the third plaintiff be deprived of his right to choose a state forum for a jury trial of his common law libel suit?

2. When a state court plaintiff objects, may a foreign corporation remove a case to a federal district court long

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and in the Court of Appeals because there was a common question of whether the cases should be tried in a state or Federal forum. The brief will relate the facts of the *Parks* case only since they are relevant on this common question of law.

after the statutory 20 day period from the occurrence of events specified in the statute (28 U. S. C., § 1446 (b)) has expired simply because the corporation has alleged fraudulent joinder of resident defendants as the ground for removal? Or, does the uniform, short and mandatory period prescribed by Congress for removal of cases from state to federal courts require remand?

STATUTES INVOLVED.

Statutes referred to in this brief are contained in an Appendix.

STATEMENT.

The sole question which petitioner seeks to bring to this Court for review is an interlocutory one. Should these common law libel cases be tried in a state court, where respondents brought them jointly against petitioner and four state residents; or in a federal district court to which petitioner sought to remove them, 335 days late in the **Parks** case and 287 days late in the **Patterson** case—when, as the Court of Appeals below observed, the 20 day statutory period prescribed by 28 U. S. C. § 1446 (b) "had long since expired" (308 F. 2d 474, 475). The asserted ground for tardy removal was that there was no reasonable basis under state law for liability of the resident defendants; and that accordingly their joinder was fraudulent and no bar to federal diversity jurisdiction.

Respondent Parks, a Montgomery city commissioner, on April 19, 1960 (R. 19), sued petitioner and four residents of Alabama, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, in the Circuit Court of Montgomery County, Alabama, for common law libel growing out of a paid advertisement published in the March 29, 1960, issue of the **New York Times** (R. 14) on which the resident defendants' names appeared as "endorsers." A string correspondent of the Times residing in Alabama and the Secretary of State of Alabama were served (R. 97). The Times received the summons and complaint on April 23, 1960 (R. 97).

Simultaneously, companion cases against the same defendants, arising out of the same publication, were begun in the same court by the other two Montgomery commissioners, Sullivan and James. (These actions are referred to in this brief as "the Sullivan case" and "the James case").

The **Sullivan** case was tried first, and there was a verdict and judgment against all defendants on November 3, 1960. The Supreme Court of Alabama affirmed. 144 So. 2d 25.

The **James** case was tried next and resulted in a verdict and judgment against all defendants on February 1, 1961. This case is still pending in the state trial court on motion for a new trial. A chronology of relevant events in the Alabama courts is contained in Appendix A of this brief.

The "fraud" advanced by the Times' tardy petition for removal filed on April 13, 1961, was that attorneys for Parks would introduce the same evidence against the resident defendants in the state court action which they had previously introduced against them in the **Sullivan** and **James** cases; that this evidence did not constitute reasonable ground under state law for judgment against them; and that the **Sullivan** and **James** cases against the resident defendants had gone to state juries under erroneous charges by the state trial court.

At the hearing on respondents' motion to remand, the evidence of "fraud" introduced by the Times was the state trial transcript in the **Sullivan** case, accompanied by the oral testimony of a Times' attorney that the Parks trial evidence would be the same. After summarily re-examining the evidence which an Alabama court had twice held sufficient to present a jury question under Alabama law, and on which two juries had rendered verdicts against all defendants, the District Court denied remand and held that there was no reasonable basis under Alabama law for joining the resident defendants and that the joinder was accordingly fraudulent. The District Court also held that the 20 day time provision of 28 U. S. C., § 1446 (b), did not apply to cases where fraudulent joinder was asserted as a ground for removal.

Nevertheless, because of doubts about the correctness of his order, the District Judge amended it so as to authorize interlocutory appeal pursuant to 28 U. S. C. 1292 (b)[2] (R. 193-194). Similar doubts unquestionably moved the Court of Appeals below, through Chief Judge Tuttle and Judges Rives and Wisdom, to permit the interlocutory appeal (R. 194-195).

These doubts were well founded. On August 30, 1962, the Supreme Court of Alabama upheld the **Sullivan** charge which the Times had termed "erroneous":

> "We have carefully read the court's entire oral instruction to the jury. It is a fair, accurate and clear expression of the governing legal principles."[3]

Moreover, the Supreme Court of Alabama held that the resident defendants were not entitled to a directed verdict. It commented that there was evidence that the four individual defendants "had all given permission to use their names in furthering the work of" the committee which had placed the advertisement with the Times. (144 So. 2d at 46). And it noted, as additional evidence against them, that "after receiving the letter demanding a retraction of the advertisement they had not replied thereto, nor

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[2] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: . . ."

[3] 144 So. 2d at 44. This part of the charge is set out in Petition, pp. 7-8. The approval is unqualified and in no way undermined by the Court's comment that an attempted objection directed to the charge by one of the attorneys for the resident defendants was "too indefinite to invite our review." (144 So. 2d at 45).

had they contacted any person or group concerning the advertisement or its retraction" (144 So. 2d at 49).

Accordingly, the "error" of Alabama law—said to have been tantamount to bad faith and fraud—turned out to be no "error" at all, but a precisely accurate appraisal of Alabama law. The Supreme Court of Alabama clearly held that there was enough evidence against the resident defendants to go to a jury. And its plain words expressly approved the trial court's instructions as to ratification. The Times' contrary assertions (Petition, p. 15) simply do not square with the facts.

Moreover, the Court of Appeals below also held that there had been no error of Alabama law and that there was a case of "substance" against the resident defendants which "could go either way" (308 F. 2d at 480-481). In short, respondents had brought to the state court a classic situation for jury determination—a right safeguarded by the 7th Amendment of the Constitution of the United States.

Though the Court of Appeals directed its attention to the question of alleged fraudulent joinder, the Court did not approve the holding of the District Court that the 20 day removal requirement (28 U. S. C. § 1446 (b)) did not apply. The Court of Appeals noted that removal had been attempted long after the statutory period had expired (308 F. 2d at 475); and expressly declined to rule "on the question of whether the motions to remove were seasonably filed" (308 F. 2d at 481). The Court recited the facts contained in the chronology (see App. A of this brief), observing:

> "The motions to remove alleged that the fraudulent joinder was known at the conclusion of the trials of the Sullivan and Jaines cases. The District Court accepted the excuse for the long delay thereafter in

fore filing the motions that counsel for The Times thought appellants here might produce some additional evidence and only gradually became aware that they would not, after which realization they moved promptly." (308 F. 2d at 481, n. 3).

This observation, climaxing a recital of chronology, is surely an exercise in the sardonic. On June 25, 1960, 292 days before removal, the Times was aware of the contentions of three of the resident defendants. The **Sullivan** "proof" on which the Times relied for its charge of fraud, concluded on November 3, 1960, 161 days prior to removal. The **James** case ended 72 days before removal. Even on the assumption that the Times' sworn removal petition seriously asserted that it did not know the facts until the end of the **Sullivan** trial, it was then aware of its "proof of fraud" 161 days in advance of removal.

The Times' exercise in fantasy can be explained. There is no mystery about the passage of 335 days. There is nothing enigmatic about the conflict between the Times' sworn answers to interrogatories, under its stipulation of January 31, 1961, that it had authority to put the resident defendants' names on the advertisement,[4] and its sworn statement in its removal petition of April 13, 1961, that it did not.

The removal petition admits liability of the Times for a serious tort against the resident defendants. Caution nec-

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[4] "[Q.] Please attach to your answer to this interrogatory every document, writing, or authorization from any of the signers of the advertisement authorizing The New York Times to publish their names in said advertisement.

"[A.] The thermafax copy of the authorization for the use of the names attached to said advertisement is attached hereto and likewise the original of such was not kept by this defendant. Exhibits 'A' and 'B' respectively, attached hereto." (*Sullivan* transcript, pp. 1705-1706, stipulated as applying in *Parks*, R. 97 and 30).

essarily dictated that such an admission should await the passage of the Alabama statute of limitations of one year.

Since the Times' entire theory of fraudulent joinder has been exploded by the decision of the Supreme Court of Alabama on the Times' "proof"—the **Sullivan** transcript—this statement of the case could stop here. For surely Parks and Patterson can be guilty of no fraud in joining as defendants state residents whose liability under state law has been affirmed by that state's highest appellate court. It is inconceivable that even the District Court would have failed to remand had the **Sullivan** decision (144 So. 2d 25) been extant at the time.[8]

With apologies for the unnecessary, but to correct the Times' statement of "all the evidence" (p. 7), respondents will recite the relevant facts. It is noteworthy at the threshold that even at the hearing in the District Court, the Times' attorney-witness, when asked whether the Times' advertisement was truthful when it included the names of the resident defendants among warm endorsers, answered: "'I don't know" (R. 65). This testimony scarcely accords with the picture which the Times seeks to draw here of an uncontroverted and undisputed record showing no connection between the resident defendants and the publication of the advertisement.

The proof will show that the names of the resident defendants were on the advertisement. They did not reply to respondent's demand for retraction, and their silence in the face of the demand's inculpatory charges that each had published the libel, under circumstances normally

[7] Title 7, § 26, Alabama Code of 1940. The advertisement was published on March 29, 1960.

[8] Indeed, the District Judge at the conclusion of the hearing announced his opinion at that time that *Parks* and *Patterson* should be returned to state court. (R. 95.)

calling for a reply, is evidence from which a jury can find that they had published the material in the ad. Their failure to deny publication—not their failure to retract—is the basis of the admission.[7]

Moreover, resident defendants' silence, and their failure in any manner to disavow the advertisement, constituted a ratification.

In addition, a letter from A. Philip Randolph (**Sullivan** transcript, p. 1706) went to the jury without objection from the defendants as part of the Times' answer to an interrogatory asking for authorization from the signers of the advertisement.[8]

A witness for the Times, Aaronson, testified without objection from resident defendants that the Randolph letter was a "written communication confirming the fact that the persons whose names were given here had authorized it" (**Sullivan** transcript, p. 1864) and that such a letter was "our usual authorization." (**Sullivan** transcript, p. 1865). Murray, the author of the ad, a witness for petitioners, testified that the executive director of the committee which inserted the ad, one Bayard Rustin, had stated that the southern ministers, including the resident defendants, did not have to be contacted or consulted since they were all members of the Southern Christian Leadership Conference, and supported the work of the committee. (**Sullivan** transcript, p. 1937).

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[7] The Times asks what the resident defendants could have done "to avoid the liability which the Court of Appeals has held may reasonably be imposed?" (Petition, p. 15). They could have done what they did at the trial—deny publication in an answer to the letter charging publication. Then their pre-trial conduct would have accorded with their trial testimony. And if they had wanted a forum as wide as that of the advertisement, they could have written, most inexpensively, a letter to the *New York Times* for publication and there explained their alleged innocence.

[8] See Footnote 4, *supra*.

The sworn complaint in **Abernathy v. Patterson**, 295 F. 2d 452 (5th Cir.), cert. denied 368 U. S. 986, was introduced without objection below (R. 47-49). It strongly underlines the correctness of the jury verdicts in **Sullivan** and **James**, and conflicts sharply with the King deposition.

In short, the Times asks this Court to find as a matter of Alabama law that the Supreme Court of Alabama and the Federal Court of Appeals for Alabama are wrong on

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a. The path-taking analysis of the Court of Appeals in that case revealed:

a. "(The complaint) alleges that on or about March 29, 1960, 'supporters of the plaintiffs and the movement for equality which they lead' inserted in The New York Times a paid advertisement . . ." (295 F. 2d at 453).

b. The advertisement "purports to be signed by twenty ministers including the four plaintiffs" (295 F. 2d at 454).

c. "The complaint then alleges 'The defendants . . . conspired and planned . . . to deter and prohibit the plaintiffs and their supporters as set forth above, from utilizing their constitutional rights and in particular their right to access to a free press, by instituting fraudulent actions in libel against the plaintiffs . . .'" (295 F. 2d at 454).

d. "Irreparable damage is alleged as follows: '. . . (b) . . . the plaintiffs herein, . . . will be deterred from using the media of a free press and all other rights guaranteed under the 1st Amendment . . .'" (295 F. 2d at 454).

e. "The relief prayed for is as follows: '. . . (b) . . . Restraining each of the defendants . . . from engaging in the aforesaid conspiracy designed to deter and prohibit the plaintiffs from exercising rights guaranteed by the 1st and 14th Amendments with respect to freedom of speech, press . . .'" (295 F. 2d at 455).

f. "As has been noted (on page 454), the plaintiffs' claim of irreparable injury and loss is based (1) upon the claim that 'the plaintiffs and the Negro citizens of the State of Alabama will be deterred from using the media of a free press . . .'" (295 F. 2d at 456).

g. "Libelous utterances or publications are not within the area of constitutionally protected speech and press. The plaintiffs' claim that they will be deterred from using the media of a free press must therefore be predicated upon their claims of denial of a fair and impartial trial of the libel actions and the absence of a plain, adequate and complete remedy at law" (295 F. 2d at 456-457).

The complaint appears in full at R. 49-64.

Alabama law; that by following their decisions on Alabama law and joining these resident defendants in Alabama libel actions, respondents are guilty of fraud; that two state juries are wrong on the facts; that the **New York Times** advertisement was not truthful when it connected these resident defendants with the advertisement as "endorsers," despite the unwillingness of a Times attorney to say so more than a year thereafter (R. 65); and that the Times on three occasions inaccurately stated in sworn answers to interrogatories that it had the authority to put the names of the resident defendants in the advertisement as endorsers.[10]

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[10] The District Judge who sat with the Court of Appeals below dissented on the basis of Rule 52 (a) of the Federal Rules of Civil Procedure. The short answer is: (a) the rule gives a presumption of correctness to findings of fact, not conclusions of law; (b) the presumption does not obtain where, as here, a District Court has based its findings on documentary evidence (*United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395-396); (c) the Rule applies to actions "*tried* upon the facts without a jury" (emphasis supplied) and not to memorandum findings in the course of ruling on a motion to remand (see 5 *Moore's Federal Practice*, § 52.08, pp. 2670-2674); and (d) at all events the District Court's action was "clearly erroneous" as squarely in conflict with Alabama law as applied to the same facts, even without the corroborative evidence. *New York Times v. Sullivan*, 144 So. 2d 25.

ARGUMENT

1. The petition asks this Court to take this case in order to enter an interlocutory order that a common law libel suit, commenced in a state court against a foreign corporation and four resident defendants, should be tried instead in a Federal District Court. The basis asserted in a removal petition filed 335 days late is that the joinder is fraudulent because there is no reasonable basis for liability of the resident defendants under state law. But the highest state court, and the Federal Court of Appeals embracing that state, have held that there is such liability under state law. Surely this petition is unique in the annals of this Court, and petitioner has cited no precedent for its request.

Without approving the District Court's holding on timeliness, the Court of Appeals below applied this Court's well established test of whether respondents had a "real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied." **Chicago, R. I and P. R. Co. v. Schwyhart**, 227 U. S. 184, 194. Moreover, as Justice Holmes wrote for the Court in **Schwyhart**, the existence of a cause of action against the resident defendants was "a question of state law" (227 U. S. 184, 193-194). There this Court found a cause of action was "established" by a state verdict and judgment against the resident defendants. In the case at bar, the highest state court has approved and upheld the verdict and judgment. **New York Times v. Sullivan** (Ala.), 144 So. 2d 25.[11]

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[11] Other cases in accord with the *Schwyhart* test of good faith are: *Mecom v. Fitzsimmons Drilling Co.* 284 U. S. 183, 189-190; *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 315-319; *Chicago, R. I. and P. R. Co. v. Whitcaker*, 230 U. S. 421, 424; *McAllister*

To reach the result desired by the Times, this Court would have to hold that respondents are guilty of fraud in joining the resident defendants in the state court because the Supreme Court of Alabama and the Court of Appeals are wrong about applicable Alabama law. Such a holding would surely make a shambles of the entire federal system. And it would constitute a startling departure from this Court's admonition to the Federal judiciary in **Shamrock Oil & Gas Corp. v. Sheets**, 313 U. S. 100, 108-109:

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

The Times cannot escape the effect of the **Sullivan** decision by arguing that the Alabama Supreme Court did not consider the correctness of the trial court's charge regarding the resident defendants, and the sufficiency of the evidence against them. As pointed out previously, the Supreme Court of Alabama expressly approved the entire charge; commented upon the evidence against the resident

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C. and O. R. Co., 243 U. S. 302, 311. See also, *Moore's Commentary on the U. S. Judicial Code*, Sec. 0.03 (3.5), p. 230.

defendants; and affirmed in the face of an assignment of error urging that a verdict should have been directed in their favor.

The foregoing disposes of the only issue involved in this case—whether respondents are to be deprived of their right to choose a state forum to try a common law libel suit. Respondents have joined state defendants on facts and law which the highest state court has held to show their liability. The Times thus seeks a manifestly unauthorized interference by federal courts in the adjudication of state courts and juries concerning matters of state law. The Times has no constitutional right to a federal trial in a diversity case. **Kline v. Burke Construction Co.**, 260 U. S. 226, 233. And it is equally elemental that state courts—not a federal court in a diversity case—have the last word on the meaning and application of state law. **Erie R. Co. v. Tompkins**, 304 U. S. 64.

The Times attempts by means of removal what the resident defendants unsuccessfully sought by independent injunction in **Abernathy v. Patterson**, 295 F. 2d 452, cert. denied 368 U. S. 986, namely, a collateral revision and arrest of state court trials on assertions of fraudulent joinder of the resident defendants. The Times is even more abortive.

That such a collateral review is the Times' real aim is clear from its "Question Presented" (p. 2) which challenges the correctness and constitutionality of Alabama decisional law rather than respondents' good faith in joining resident defendants in state court.

These resident defendants have attempted to bring the **Sullivan** record to this Court for review. **Abernathy et al. v. Sullivan**, No. 609. The respondent in that case has shown that there is no federal question for review and that the state decision involves a plain issue of state law.

in the process, that respondent (Brief in opposition, pp. 14-18) has reviewed the authorities which support the holding of the Supreme Court of Alabama and the Court of Appeals below. Moreover, as the record at bar and decision of the Court of Appeals reveal, these respondents will have the additional evidence of the complaint in **Abernathy v. Patterson**, 295 F. 2d 452 (R. 109-164).

Petitioner chose to base its claim of fraudulent joinder on the **Sullivan** record. Fraud was involved, the Times argued, because that record showed the resident defendants were not liable under Alabama law. Subsequently, the Alabama Supreme Court held that this record did show liability under Alabama law. And the Court of Appeals below—after an independent determination—held that there was a substantial question of liability which could go either way.

The attempt of the Times, with no constitutional right to a federal diversity trial, to draw a federal question from the circumstances of this case is as preposterous as it is unique. There is no federal question for this Court to review.[12]

2. The Court of Appeals had an additional and independent reason for remanding this case to the state courts.

[12] The final argument of the Times that the *Sullivan* decision deprives the resident defendants of certain supposed constitutional rights has no place in this proceeding. The Times may not assert a fancied infringement of the constitutional rights of others in a different case as a reason for review of the decision of the Court of Appeals at bar to remand *this* case to a state court. *Poe v. Ullman*, 367 U. S. 497, 503, holds that constitutional questions are decided within the framework of an adjudicatory process "exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."

Moreover, the absurdity of the underlying constitutional argument—entirely hypothetical in this proceeding—is fully demonstrated in the brief in opposition in No. 609.

The Times has patently violated the time provisions of 28 U. S. C., § 1446 (b) by bringing its petition for removal 335 days late. While it did not pass on the matter, the Court of Appeals below expressly refused to approve the holding of the District Court that this time limitation did not apply to fraudulent joinder cases. And the Court of Appeals plainly foretold its holding (See extensive footnote 3 at 308 F. 2d 474, 481).

The District Court could cite no precedent for its holding that the statutory time for removal did not apply to cases where the removing defendant urged fraudulent joinder. And even if the most extreme latitude were given to the Times, even if it could justifiably refuse to rely on information in its own files or otherwise readily available to it in its search for a statutory "order or other paper from which it may first be ascertained that the case is one which is or has become removable,"[13] the Times, aware of a deposition proceeding and two trials in companion cases, was unable to come within twenty days of any such event.

The cases cited by the District Court do not support the striking proviso which it sought to engraft on § 1446 (b). They involve a plaintiff's voluntary discontinuance of the resident defendant;[14] amendment of the initial pleading to raise the amount in controversy to the federal jurisdictional amount;[15] amendment of the initial pleading or filing of additional pleading to reveal for the first time a separable controversy under the law then existing;[16] a

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[13] 28 U. S. C., § 1446 (b).

[14] *Powers v. C. & O. R. Co.*, 169 U. S. 92.

[15] *Remington v. Central Pacific*, 198 U. S. 95; *Northern Pacific R. Co. v. Austin*, 135 U. S. 315 (removal not allowed even so).

[16] *Fritzlen v. Boatmen's Bank*, 212 U. S. 364.

voluntary severance of a fictitious defendant when plaintiff announced ready for trial.[17]

The rationale of these cases is that if the rule were otherwise, a plaintiff could change an unremovable case after the time for removal had expired and still remain in state court.[18]

These circumstances are clearly not involved at bar. These cases have had the same parties, issues, facts and amounts in controversy from their inception almost a year before removal.

Objection for untimeliness was made immediately in the District Court. Accordingly, that Court improvidently cited cases which hold that objections to removal made for the first time in the Supreme Court of the United States are too late;[19] and that an imperfect removal was attributable to the plaintiff's withholding service of summons on the resident defendant.[20]

The District Court's citation of **Weeks v. Fidelity & Casualty Co.**, 218 F. 2d 503 (5th Cir. 1955), is misplaced, though the case did remand for late filing. If Parks and

[17] *Fidelity & Casualty Co. v. Safeway Steel Co.*, 191 F. Supp. 220 (N. D. Ala. 1961).

[18] A discussion of this principle can be the only conceivable relevance of *Great Northern R. Co. v. Alexander*, 246 U. S. 276, cited by the District Court. *A. G. S. R. Co. v. Thompson*, 200 U. S. 206, is devoted entirely to a question of separable controversies under the old statute and has no relation whatever to the proposition for which the District Court cited it.

[19] *Martin v. B. & O. R. Co.*, 151 U. S. 673.

[20] *Wright v. Missouri Pac. R. Co.*, 98 F. 2d 34 (8th Cir. 1938). The issue in this case was not one of timeliness, but whether resident defendant had joined in the petition for removal. The court held that plaintiff could not object to the failure of the resident defendant to join in the petition when he had not served the resident defendant.

Patterson had not objected, then the **Weeks** dictum that timeliness may be waived by failure to object would be relevant.

Just as misplaced as its reliance on **Weeks** is the District Court's citation of holdings that the removing party himself may not object later for timeliness;[21] that removal may not be effected even after an amendment raising the amount in controversy, when there was no timely petition for removal after that change;[22] that there could be no removal even after the state court had sustained a demurrer to the evidence by a resident defendant and directed a verdict for him;[23] and that where a case, brought in a state court against several defendants, including a non-resident, was dismissed as to all defendants, a reversal as to the non-residents on state appeal permitted this defendant, who had already filed a petition for removal to remove by subsequent petition.[24]

Accordingly, the District Court has cited no case supporting its holding that the statutory time for removal does not apply to cases where a removal defendant urges fraudulent joinder. Clearly, this striking departure from the Congressional prescription of a uniform, short and mandatory period of time for removal of cases from state to federal courts would have been reason enough for reversal of the District Court and remandment to the state courts.

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[21] *Ayers v. Watson*, 113 U. S. 594.

[22] *Northern Pacific R. R. v. Austin*, 135 U. S. 315.

[23] *Kansas City, etc. R. Co. v. Herman*, 187 U. S. 63.

[24] *Vilas v. Rose*, 90 U. S. 530. Cf. *Whitcomb v. Smithson*, 175 U. S. 635.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Certificate.

I, M. Roland Nachman, Jr., of counsel for Respondent Parks, and a member of the bar of this Court, certify that I have mailed by air mail, postage prepaid, a copy of the foregoing Brief in Opposition to Messrs. Lord, Day & Lord, 25 Broadway, New York, New York, counsel for The New York Times Company, Petitioner.

This ..... day of January, 1963.

.....

M. R. Nachman, Jr.,
Of Counsel for Respondent Parks.

APPENDIX A

Undisputed Chronology of Events in Alabama Courts

(R. 30 and 40 and R. 96-98.)

April 19, 1960	Parks complaint filed.
April 21, 1960	Service on McKee and on the Secretary of State of Alabama.
April 23, 1960	Summons and complaint received by The New York Times as evidenced by return receipt card.
May 20, 1960	Motion to quash service of process filed by The New York Times in Alabama Court.
June 3, 1960	Depositions of Claude Sitton and Thomas M. Hurley taken in Atlanta, Georgia.
June 25, 1960	Depositions of resident defendants, Abernathy, Seay and Lowery taken in Montgomery, Alabama. These defendants disclaimed authorization for use of their names in the advertisement. Attorney for The Times present at this proceeding. (See R. 41-42.)
August 5, 1960	Motion to quash Sullivan service denied after evidence taken in open court before trial judge.
November 3, 1960	Judgment in Sullivan case rendered against all defendants.
November 21, 1960	Stipulation between attorneys for plaintiff and for The New York Times with

	reference to the transcript of record in Parks v. The New York Times Co. et al., to be filed in the Supreme Court of Alabama. (See R. 104-107.)
December 9, 1960	Stipulation approved by Supreme Court of Alabama. (See R. 108-109.)
December 16, 1960	Amendment to motion to quash service filed by Times in Parks case.
December 16, 1960	Hearing on motion and amended motion of Times to quash service in Parks case.
December 16, 1960	Order of Circuit Court of Montgomery County, Alabama, denying motion to quash and amended motion to quash service of The New York Times in Parks case.
January 31, 1961	Interrogatories served on New York Times, and stipulation between counsel for plaintiff and defendant New York Times that answers in Parks case could be the same as in Sullivan v. The New York Times et al.
February 1, 1961	James case judgment rendered against all defendants.
February 10, 1961	Motion filed by New York Times asking notice of time and place of selecting jury venire for the Parks case. Motion granted on same date.
March 3, 1961	Special drawing of the jury venire of the Circuit Court of Montgomery County, Alabama, for cases to be tried during the week of May 1, 1961, pursuant to the request and in the pres-

	ence of counsel for New York Times. Announcement at this time by Presiding Judge Jone that Parks v. The New York Times Company et al. would be set for trial on merits on May 1, 1961.
April 13, 1961	Petition for removal (R. 3-17) to the United States District Court filed.
April 13, 1961	Parks' motion to remand filed (R. 17-21).
April 20, 1961	Patterson's motion to remand filed (R. 219-224).

APPENDIX B.

28 U. S. C., Section 1446:

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Title 7, Section 26, Alabama Code of 1940:

"Limitation of One Year—The following must be commenced within one year:

* * *. Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated (1935, p. 780).

Rule 52, Federal Rules of Civil Procedure:

Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the

court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

Amendment 7 of the Constitution of the United States:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 52

THE NEW YORK TIMES COMPANY,
A Corporation,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Of Counsel

IN THE

Supreme Court of the United States

October Term, 1962

No. 687

THE NEW YORK TIMES COMPANY,
A Corporation,

Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

The respondents' brief in opposition argues that the Supreme Court of Alabama, in affirming the judgment against the resident defendants in the *Sullivan* case, held that the evidence sufficed to make a case against those defendants under the law of Alabama and that the trial court's charge as to liability based on ratification by silence was correct. We submit that the opinion of the Alabama Supreme Court refutes this contention and that the argument is inconsistent with the position taken by counsel for respondents in opposing the petition for a writ of certiorari in *Abernathy* v. *Sullivan*, No. 609, this Term.

I

As to the sufficiency of the evidence, the *Sullivan* opinion reads as follows (144 So. 2d at 46):

> "There being no judgments on the motion for a new trial of the individual appellants, and they having

> become discontinued, those assignments by the individual appellants attempting to raise questions as to the weight of the evidence, and the excessiveness of the damages are ineffective and present nothing for review. Such matters can be presented only by a motion for a new trial."

The brief in opposition in *Abernathy* v. *Sullivan*, No. 609, this Term, in enumerating matters which the respondent argued "are not" in that case (p. 7) includes the following (p. 11):

> "When petitioners allowed their motions for new trial to lapse, they were foreclosed from raising questions regarding alleged excessiveness of the verdict, or alleged insufficiency of the evidence."

The meaning of this submission by the respondent in *Sullivan* is elucidated by the further contention (pp. 13-14) that "the only question which petitioners might argue on this record is whether it is 'entirely devoid of evidence of any authorization, consent or publication' by petitioners," in the sense of *Thompson* v. *City of Louisville*, 362 U. S. 199 and *Garner* v. *Louisiana*, 368 U. S. 157. That is, of course, an issue which is narrower by far than that of whether the petitioners, on all the evidence, were entitled to dismissal of the action or to the direction of a verdict.

The respondents are entirely right in stating that the propriety of the trial court's denial of the affirmative charge requested by the individual defendants was properly before the Supreme Court of Alabama in *Sullivan*, notwithstanding its determination that the motion for new trial had become discontinued. *Foster* v. *Shepherd*, 269 Ala. 94, 110 So. 2d 894; *McMillan* v. *Aiken*, 205 Ala. 35, 40, 88 So. 2d 135. It is difficult to think that even this was actually passed on by the Court, since the opinion is silent on the issue and thus gives no indication of a possible basis for concluding that the trial court was correct. Assuming, however, that the matter was determined, the issue posed by the requested charge under the Alabama practice is confined to whether

there is a scintilla of evidence supporting liability under any of the plaintiff's theories of the case. See *Southern Apartments, Inc.* v. *Emmett*, 209 Ala. 584, 587-588, 114 So. 2d 453. The plaintiff in *Sullivan* argued that the Randolph letter to *The Times* concerning the original draft of the proposed advertisement (S. Tr. 1706; as to which see our petition, p. 7) and the silence of the defendants, viewed as an admission, constituted evidence that the defendants authorized the use of their names. The Alabama Supreme Court may have regarded this as a scintilla, while withholding judgment as to whether the verdict ought to have been set aside on all the evidence and as to whether the alternative theory of liability based on imputed ratification was valid. Such a determination plainly would not bind the District Court in its appraisal of the evidence on the removal and motion to remand; nor would it declare anything about the Alabama law that has a bearing on this case.

II

As to the charge of the trial court in *Sullivan* on the issue of ratification, the opinion of the Alabama Supreme Court says only the following (144 So. 2d at 45):

> "In their assignment of error No. 41, the individual appellants assert that the lower court erred in its oral instructions as to ratification of the use of their names in the publication of the advertisement. The instructions of the court in this regard ran for a half a page or better. The record shows that an exception was attempted in the following language:
>
> "'Lawyer Gray: Your Honor, we except to the court's charge dealing with ratification as well as the court's charge in connection with the advertisement being libelous per se in behalf of each of the individual defendants.'
>
> "The above attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review."

The Court's general endorsement of the charge as "a fair, accurate and clear expression of the governing legal principles," relied on by respondents in this case (Brief in Opposition, pp. 6-7, 14), when read in context, plainly refers only to the charge on libel, of which *The Times* complained, not to the charge on ratification, which alone is relevant to this petition.

III

What has been said makes clear, we think, that there is, at the least, a major question as to how far, if at all, the Supreme Court of Alabama in the *Sullivan* case declared *sub silentio* the law of Alabama on the respondents' case against the resident defendants. Since certiorari has been granted to review the judgment in *Sullivan*, that question will inevitably be examined by this court in determining the issues open for review on the petition of the individual defendants. *Abernathy, et al.* v. *Sullivan*, No. 609, this Term. It is appropriate, therefore, in our submission, that the issue be examined here as well or that the Court hold this petition pending its decision after argument of No. 609.

IV

The respondents urge as an objection to review their challenge to the timeliness of the removal, though the point was ruled against them by the District Court and was not passed on by the court below.

Assuming that it would be open to respondents to advance this ground in support of the judgment ordering remand (*Langres* v. *Green*, 282 U. S. 531, 535), we submit that the possible presence of that question in the case is, if anything, a further reason for review. For whether the time limit on removal prescribed by 28 U. S. C. § 1446(b), as amended in 1949, lays down a universal mandate, as respondents argue, is an important question of Federal practice which has not been determined by this Court.

That the respondents misconceive the situation in contending that the time limitation was "patently violated" is entirely clear. The statute does not in terms apply to cases such as this, where there is no "amended pleading, motion, order or other paper" received by the defendant "from which it may first be ascertained that the case is one which is or has become removable." Recognizing that there was no legislative purpose to eliminate removals the propriety of which does not appear upon the papers, the courts which have passed upon the issue have not deemed the 1949 revision to alter the prior law (see *e.g. Ayres* v. *Watson*, 113 U. S. 594, 597; *Powers* v. *C&O Ry. Co.*, 169 U. S. 92) that the time limitation is not jurisdictional. That view has heretofore been taken by the court below (*Weeks* v. *Fidelity & Casualty Co.*, 218 F. 2d 503), without dissent, so far as we are aware, in any other Circuit. See *e.g. McCleod* v. *Cities Service Gas Company*, 233 F. 2d 242 (10th Cir.). We think it is correct.

Respectfully submitted,

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